

9-113.000

FORFEITURE SETTLEMENTS

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9-113.100 Forfeiture by Settlement and Plea Bargaining in Civil and Criminal Actions

Settlements to forfeit property are encouraged to conserve the resources of both the United States and claimants in situations where justice will be served. *See* the Criminal Resource Manual at 2240. *The following principles must be observed when negotiating and structuring settlements.* The critical principle that must be applied to all settlements is that civil forfeiture, either judicial or administrative, should not be used to gain an advantage in a criminal case. Furthermore, all settlements must be in compliance with Attorney General Order

No. 92-1598, Appendix to Subpart Y, Part O, Title 28, Code of Federal Regulations (C.F.R.) establishing the settlement and compromise authority redelegated to the United States Attorneys from the Assistant Attorney General, Criminal Division, in accordance with the requirements of 28 C.F.R. § 0.168(d). Other general requirements applicable to all settlements are set out in USAM 9-113.101 through 9-113.800.

9-113.101 Statutory Basis Requirement for Forfeiture by Settlement and Plea Bargaining in Civil and Criminal Actions

There must be a statutory basis for the forfeiture of the property and sufficient facts stated in the settlement documents to satisfy the elements of the statute.

9-113.102 Consultation with the Seizing Agency Requirement for Forfeiture by Settlement and Plea Bargaining in Civil and Criminal Actions

All settlements must be negotiated in consultation with the seizing agency and the U.S. Marshals Service. *See* the Criminal Resource Manual at 2241.

9-113.103 Consultation with the Seizing Agency Before Settlement or Plea Bargaining in Civil and Criminal Actions to Determine Pending Administrative Forfeitures

It is the obligation of both the Assistant United States Attorney (AUSA) and the investigating agent before any type of settlement is discussed to determine what property, if any, is presently being processed for administrative forfeiture. Moreover, AUSAs may not reach agreements with defendants or their counsel about the return of property that is the subject of an administrative forfeiture proceeding without first consulting the seizing agency. *See* the Criminal Resource Manual at 2242.

9-113.104 Dispute Resolution in Consultations with the Seizing Agency Before Settlement or Plea Bargaining in Civil and Criminal Actions

When the seizing agency disagrees with the United States Attorney's recommended settlement proposal, it must follow the procedures that are set forth in Attorney General Order 1598-92.

9-113.105 Coordination of Forfeiture Settlements by United States Attorneys

A United States Attorney has the authority to settle those judicial forfeiture actions involving property located in his or her judicial district. In addition to complying with Department rules and regulations governing the settlement of cases, to settle forfeiture actions involving property located in another judicial district, the United States Attorney handling the forfeiture must notify and coordinate with the United States Attorney in the district where the property is located. It is the complete responsibility of the United States Attorney in the district that forfeits real property located in another district to comply with the requirements for forfeiture in the district where the property is located. Failure to comply with such requirements may result in a cloud on the government's title; coordination will minimize this possibility.

9-113.106 Settlement of Forfeiture in Conjunction with Plea Bargaining

The government may conclude a civil forfeiture action in conjunction with the criminal charges against the defendant which provided the cause of action against the property. The government should *not* agree, however, to release property subject to forfeiture (civil or criminal) in order to *coerce* a guilty plea on the substantive charges, nor should the government agree to dismiss criminal charges in order to *coerce* a forfeiture settlement. If a plea agreement is not to conclude the civil forfeiture case, language to that effect should also be stated in the plea agreement. Failure to specify in this manner could be fatal to the concurrent civil forfeiture action. Further specific principles governing "global" settlements are as follows:

In all cases, agreements must be based upon facts which support forfeiture. The Department does not release property which is otherwise subject to forfeiture to encourage guilty pleas; nor does it permit defendants to submit property which is otherwise not subject to forfeiture in order to lighten the potential incarceration component of the punishment.

To the maximum extent possible, the criminal plea and forfeiture should conclude the defendant's business with the government. Delaying forfeiture considerations until after the conclusion of the criminal case unnecessarily extends the government's involvement with the defendant and diminishes its effectiveness.

Where the claimant/defendant has negotiated a plea agreement and concurrently wishes to forfeit the property subject to a civil forfeiture action, the plea agreement should state that the defendant has waived any and all rights--constitutional, statutory, or otherwise. Any civil settlement should be documented independently of the plea agreement and should include the following information:

- the claimant/defendant's interest in the property;
- an admission of the facts supporting forfeiture;
- the claimant/defendant gives up all rights to the property;
- he/she gives up any right to contest the forfeiture; and
- settlement should be supported by written agreement.

Furthermore, the defendant, in the plea agreement, must admit to facts sufficient to support the forfeiture. The government, however, should not waive its right to reopen a civil forfeiture action where it is later determined that the settlement was based on false information or where the defendant violates his plea agreement.

9-113.107 Forfeiture Settlements Involving Partial Payments

Settlements shall not provide for partial payments, except upon the advice and approval of the Asset Forfeiture and Money Laundering Section, Criminal Division, in consultation with the U.S. Marshals Service, Headquarters Seized Assets Division. In Department of the Treasury cases also, the advice and approval of the Asset Forfeiture and Money Laundering Section, Criminal Division, should be sought.

9-113.108 Reacquisition of Forfeited Property

The settlement should state that the claimant/defendant may not reacquire the forfeited property directly or indirectly through family members or others acting in concert with him or her.

9-113.109 Tax Obligations, Fines, Penalties, and Other Monetary Obligations in Forfeiture Settlements

The terms of the settlement, unless specified, do not affect the tax obligations, fines, penalties, or any other monetary obligations of the claimant/defendant owed to the government. The civil settlement documents should state this clearly. *See* the Criminal Resource Manual at 2243.

9-113.200 Monetary Amounts of Forfeiture Settlement Authority

United States Attorneys have authority to settle civil and criminal forfeitures within the following monetary amount or value limitations:

- cases not in excess of \$500,000; and
- cases between \$500,000 and \$5,000,000, provided that the settlement releases not more than 15 percent of the amount involved.

The United States Attorney must consult with the Asset Forfeiture and Money Laundering Section (AFMLS), Criminal Division, before settling forfeiture cases involving \$5,000,000 or more, and before a settlement releasing more than 15 percent of the amount involved in any case between \$500,000 and \$5,000,000. *See* Attorney General Order No. 92-1598, Appendix to Subpart Y, Part O, Title 28, Code of Federal Regulations (C.F.R.).

The authority of the Assistant Attorney General pursuant to 28 C.F.R. § 0.160 for settlement of forfeiture cases is delegated to the Chief, AFMLS, (formerly "Director, Asset Forfeiture Office"), Criminal Division, by paragraph (c) of Attorney General Order No. 1598-92. This authority is limited to settlements releasing not more than \$2,000,000 or 15 percent of the amount involved, whichever is greater. When the proposed settlement would release more than \$2,000,000 or 15 percent of the amount involved, whichever is greater, the Director, AFMLS, Criminal Division must refer the matter to the Deputy Attorney General for approval pursuant to 28 C.F.R. § 0.161.

9-113.300 Effecting Settlement Agreements Through Administrative Forfeiture

The following procedures apply to settlement agreements in civil judicial forfeiture cases and to criminal forfeiture plea agreements where an administrative forfeiture is necessary to effectuate the agreement. In such cases, the headquarters of the seizing agency involved must be consulted by the United States Attorney's Office prior to finalizing an agreement in order to ensure the agency can accommodate the terms of the agreement. The Department's policy is to pursue an agreed upon administrative forfeiture where it is possible and economically efficient to do so.

9-113.310 Use of Administrative Forfeiture in Settlement of Civil Judicial Forfeitures Stemming From Administrative Actions

The following requirements must be met where a claim and a cost bond have been filed and the case has been referred to the United States Attorney but a settlement is reached before a civil judicial complaint has been filed.

The terms of the settlement should be reduced to writing by the United States Attorney and include:

- A provision whereby the claimant/defendant identifies his or her ownership interest in the property to be forfeited;
- A provision whereby the claimant/defendant gives up all right, title, and interest in the property;

- A provision whereby the claimant/defendant agrees not to contest the government's administrative forfeiture action;
- A provision whereby the claimant/defendant agrees and states that the property to be forfeited administratively was connected to the illegal activity as proscribed by the applicable civil forfeiture statute (e.g., money to be forfeited is in fact proceeds from illegal drug trafficking);
- Specific reference to the withdrawal of the claim and the disposition of the cost bond, (*see* discussion regarding the disposition of cost bonds at USAM 9-112.330 and 9-112.340, and in the Criminal Resource Manual from 2237 to 2239; and
- A "hold harmless" provision and a general waiver of Federal Tort Claims Act rights and *Bivens* actions, as well as other actions based on the Constitution (e.g., the Excessive Fines Clause). Finally, a *Halper* waiver should be included so that future civil or criminal cases are not hampered by the settlement agreement.

The case should be referred promptly back to the seizing agency to reinstitute the administrative process. The seizing agency shall reinstitute the administrative forfeiture process to effectuate the agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

Where the agreement provides for the claimant to withdraw the claim to all property covered by claim and cost bonds filed, the entire case will be referred back to the agency for administrative forfeiture. Re-publication of the notice of the administrative forfeiture action is not necessary, provided publication occurred prior to filing of the claim and cost bond.

Where the agreement provides for the claimant to withdraw only a part of a claim, the case will be referred back to the agency for administrative forfeiture of that portion of the forfeitable property named in the agreement, and the agency may release the remainder to the claimant consistent with the settlement. Re-publication of the notice or of the administrative forfeiture action is not necessary, provided publication covering the property to be forfeited occurred prior to the filing of the claim and cost bond.

9-113.320 Use of Administrative Forfeiture in Settlement of Civil Judicial Forfeitures not Stemming from Administrative Actions

In cases where the judicial action was commenced without a prior administrative forfeiture action having begun and a settlement agreement has been reached involving a proposed administrative forfeiture of seized property:

- the headquarters of the seizing agency must concur in that part of the settlement that would obligate the agency to commence administrative forfeiture proceedings;
- the complaint must be dismissed; and
- the jurisdiction of the district court must be relinquished before referral may be made to a seizing agency under this policy.

The seizing agency shall initiate the administrative forfeiture process to effectuate such an agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

9-113.330 Use of Administrative Forfeiture in Settlement of Criminal Forfeitures.

In those cases where property has been seized or restrained for forfeiture under criminal statutes and an agreement reached between the United States Attorney and the claimant/defendant prior to an order of forfeiture relating to a proposed administrative forfeiture of the property:

- the headquarters of the seizing agency must concur in that part of the settlement that would obligate the agency to commence administrative forfeiture proceedings;
- the seizure or restraining orders must be dismissed; and
- the jurisdiction of the district court over the property must be relinquished. The provisions of USAM 9-113.310 must be met before referral may be made to a seizing agency under this policy. The seizing agency shall initiate the administrative forfeiture process to effectuate such an agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

9-113.400 Judicial Forfeiture Settlements and Petitions for Remission or Mitigation

No agreement, whether a settlement in civil judicial action or a plea agreement resolving both criminal charges and the forfeiture of assets, may contain any provision binding the Department and the agencies to a particular decision on a petition for remission or mitigation, or otherwise contain terms whose effectiveness is contingent upon such a decision. The remission and mitigation process, like the pardon process in criminal cases, is completely independent of the litigation and case settlement process. The Asset Forfeiture and Money Laundering Section, however, in appropriate cases upon request, will adjudicate a properly filed petition for remission or mitigation prior to the negotiation of a forfeiture settlement or entry of a final order of forfeiture. It is proper to include in a settlement agreement a provision that expressly leaves open or expressly forecloses the right of any party to file a petition for remission or mitigation. The settlement document should also include a "hold harmless" provision and a general waiver of Federal Tort Claims Act rights and *Bivens* actions, as well as other actions based on the Constitution (e.g., the Excessive Fines Clause). Finally, a *Halper* waiver should be included so that future civil or criminal cases are not hampered by the settlement agreement.

9-113.410 Civil Judicial Forfeiture Settlement Procedures

Any settlement that purports to "forfeit" property binds only the parties to it and forfeits only that interest in the property that the claimant possesses. The following procedures must be followed to ensure that a valid and complete civil judicial forfeiture by settlement occurs:

- A civil verified complaint for forfeiture of the property must be filed in the U.S. District Court to establish the court's jurisdiction. Filing an action as a "Miscellaneous Docket" and other attempts to short-cut the process will not be recognized as a valid forfeiture.
- A warrant of arrest in rem must be executed against the property.
- All known parties in interest must be given written notice, and notice by publication must be made.
- After 10 days, if no claim has been filed pursuant to Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims, a default judgment must be sought pursuant to Rule 55, Federal Rules of Civil Procedure.
- Proposed orders of forfeiture must be filed with the settlement agreement and include the terms of the settlement agreement. *See* the Criminal Resource Manual at 2244.

9-113.420 Criminal Forfeiture Settlement Procedures

The following procedures must be followed to ensure that a valid forfeiture results from a plea settlement:

- There must be a forfeiture count in the indictment or information, otherwise forfeiture is legally impossible. To the extent property is known to be subject to forfeiture, it should be listed in the indictment, information,

or in a subsequent Bill of Particulars. The United States Attorney's Office must ensure that its criminal pleadings are in compliance with Rules 7 and 31 of the Federal Rules of Criminal Procedure.

- The United States Attorney must comply with the requirements applicable to third party interests (e.g., 21 U.S.C. § 853(n)(1)-(7), including notice of the forfeiture and the right of third parties to obtain an adjudication of their interests in the property.
- The settlement to forfeit property must be in writing, and the defendant must concede facts supporting the forfeiture.
- Close attention should be paid to the potential issue of "double jeopardy." Any plea or settlement agreement should include a waiver of any and all double jeopardy claims that might otherwise be asserted with respect to any subsequent government enforcement action. Therefore, a *Halper* waiver should be included so that future civil or criminal cases are not hampered by the settlement agreement. The settlement document should also include a "hold harmless" provision and a general waiver of Federal Tort Claims Act rights and *Bivens* actions, as well as other actions based on the Constitution.
- The court must issue a Final Order of Forfeiture that incorporates the settlement and, if applicable, addresses any third party claims.
- Wherever possible, in order to avoid protracted litigation of ownership issues in the context of ancillary hearings, the United States should agree to accept unencumbered property only, with the exception of valid financial institution liens, or at the very least, the plea agreement should require the defendant to convey clear title to the government. *See* USAM 9-113.107 (Forfeiture Settlements Involving Partial Payments).

9-113.500 Acceptance of a Monetary Amount in Lieu of Forfeiture

A monetary amount may be accepted in lieu of forfeiture of the property in civil or criminal judicial forfeiture actions pursuant to 19 U.S.C. § 1613(c), which is one of the customs laws (Tariff Act of 1930, 19 U.S.C. § 1602-21) incorporated by reference into various federal forfeiture statutes. *See, e.g.*, 21 U.S.C. § 881(d). The following procedures must be followed:

- A civil complaint against the property or an indictment, or information naming the property, and alleging the defendant's interest in the property must be filed.
- A written statement that incorporates the language of section 1613(c) must be filed and approved by the court.
- The agreement to substitute money in lieu of forfeiture of property in judicial cases must be approved by the court.
- The U.S. Marshals Service will accept this court approved settlement and deposit the money (and share it where appropriate) in the same manner as the proceeds of sale of a forfeited item.
- Monies received in lieu of forfeiture must be transferred to the U.S. Marshals Service's District Office in custody of the asset being returned.
- In cases where the Postal Inspection Service or the National Marine Fisheries Service is the primary federal investigative agency, the U.S. Marshals Service must deposit the money, deduct expenses (if any) incurred with respect to the property being returned, deduct the approved equitable shares attributable to other federal agencies participating in the Department of Justice Assets Forfeiture Fund, and transfer the balance by refund to the above services, as appropriate. Each service will be responsible for sharing with participating state and local agencies in these cases.

9-113.600 Agreements to Exempt Attorneys' Fees from Forfeiture

Any agreement to exempt an asset from forfeiture so that it can be transferred to an attorney as fees must be approved by the Assistant Attorney General for the Criminal Division. *See* USAM 9-119.200.

9-113.700 Settlement with Fugitives in Civil Forfeiture Cases

Prosecutors should first consult with the Asset Forfeiture and Money Laundering Section, Criminal Division, before engaging in settlement negotiations in civil forfeiture cases where the claimants are fugitives in United States criminal proceedings.

9-113.800 Expedited Payment of Lienholders in Forfeiture Cases

The former Executive Office for Asset Forfeiture interpreted 28 U.S.C. § 524(c) as authorizing pre-forfeiture payment of liens and mortgages. Use of this authority must be approved in writing by the Asset Forfeiture and Money Laundering Section prior to entering into any agreement to pay a lienholder. It is intended that this authority be used sparingly and only in those situations where pre-forfeiture payment of liens and mortgages is necessary to avoid extreme hardship to natural persons. All other viable options, including interlocutory sales, must be pursued prior to seeking this authority.